Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Implementation of Section 208 of the Satellite Home Viewer Extension and Reauthorization Act Of 2004 Report to Congress	))))))))	MB Docket No. 05-28

JOINT REPLY COMMENTS OF NBC UNIVERSAL, INC.
AND NBC TELEMUNDO LICENSE CO.

This docket is intended to examine a very narrow question: to what extent do the slight differences in the Commission's established policies on retransmission consent, network non-duplication and syndicated exclusivity vis-à-vis cable operators and DBS providers adversely affect the multichannel video programming distribution market? [1] Some comments address this very narrow question that, at most, intends to tweak what are long-settled Commission policies. [2] Others, however, instead use this limited docket to resurrect long-settled issues regarding the very principles underlying retransmission consent and the Commission's local station exclusivity policies.

Retransmission consent is not just an aspect of the free market; it is the free market. Retransmission consent is nothing more than allowing a free, over the air broadcast station to decide not to relinquish its most valuable asset – its programming – to a competitor and get nothing in exchange. Similarly, network nonduplication and syndicated exclusivity policies enable the enforcement of private

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1 *See* FCC Public Notice, *Media Bureau Seeks Comment for Inquiry Required by the Satellite Home Viewer Extension and Reauthorization Act on Rules Affecting Competition in the Television Marketplace*, DA 05-169 (Jan. 25, 2005).

2 *See, e.g.*, Comments of the National Association of Broadcasters, *Implementation of Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* (filed March 1, 2005).

parties' exclusivity agreements (within a specified geographic area) against parties that may not be privy to those agreements (i.e., cable operators). None of the comments in this proceeding has offered any basis for the government to interfere with these workings of the free market.

Government Has Long Recognized That Retransmission Consent and Limited Exclusivity Protections Strengthen the Free Market in Video Programming

Both retransmission consent and network and syndicated exclusivity have long been determined to serve the public interest. More than a decade ago, Congress concluded that local television broadcast stations should not be forced to give away their valuable programming assets to cable operators, which in turn used the stations' signals to sell cable services to subscribers, the effect of which was to reduce the viewers of and advertisers on those stations.

Congressional passage of the Cable Television Consumer Protection and Competition Act of 1992 expressly intended to end what had been an extraordinary exception to the fundamental free-market principles. Under Commission's Rules in place during the 1970s, cable operators could resell local television stations' programming to their subscribers without having to ever obtain the right to distribute that programming from those local stations. This sweeping exception to local stations' fundamental property rights as a means of subsidizing the cable industry when that industry's primary purpose was to retransmit broadcast programming to households that could not easily receive that programming over the air.

In passing the 1992 Cable Act, Congress expressly recognized that the conditions that arguably justified this extraordinary exception no longer applied *and* that failure to eliminate this exception was resulting in cable having an undue and unjustifiable advantage: [3]

> [B]roadcast programming that is carried remains the most popular programming on cable systems, and a substantial portion of the benefits for which consumers pay cable systems is derived from carriage of the signals of network affiliates, independent television stations, and public television stations. . . Cable systems, therefore, obtain great benefits from local broadcast signals which, until now, they have been able to obtain without the consent of

[3] Cable Television Consumer Protection and Competition Act of 1992, H.R. Conf. Rep. 102-862 (dated Sept. 14, 1992) (Findings at 19) (the "1992 Cable Act").

> the broadcaster or any copyright liability. This has resulted in an effective subsidy of the development of cable systems by local broadcasters. While at one time, when cable systems did not attempt to compete with local broadcasters for programming, audience, and advertising, this subsidy may have been appropriate, it is so no longer and results in a competitive imbalance between the two industries.

Accordingly, Congress, through the 1992 Cable Act, eliminated this narrow exception and restored free-market negotiations with respect to cable retransmission and reselling of local stations' broadcast content.

Just five years ago, Congress implicitly endorsed its prior conclusion with respect to the satellite industry (even though the DBS industry was less secure at that time than its cable competitors) when Congress employed a similar market-based retransmission consent regime for local-into-local carriage by DBS providers. Just last year, Congress again chose not to alter retransmission consent in passing the Satellite Home Viewer Extension and Reauthorization Act of 2004; indeed, that Act took further steps to ensure that local television stations are able to continue to serve their local communities.

Similarly, forms of syndicated and network programming exclusivity have been effective for many years. The purpose of these policies is not just to protect local stations' service to their local communities, but also to ensure that a station can enforce its bargained-for network or syndicated exclusivity vis-à-vis a cable operator (within specified geographic zones). The policies offer a further key public benefit: they enable a program producer to better reclaim the value of its program in multiple markets, which increases the likelihood that such programming will continue to be produced.

The Free Market, Embodied by Retransmission Consent, Has Been an Overwhelming Success for Stations, Operators and Consumers

Retransmission consent conveys an overwhelmingly practical benefit: it works. Retransmission consent has been available for more than a decade; and the occasions when cable operators and broadcast stations have been unable to come to an agreement are few – even though cable operators have been unwilling to pay a license fee in exchange for the valuable right to retransmit a local stations' programming.

Retransmission consent works because, as a rule, the free market works. Private program negotiations work between broadcasters and cable operators in just the same way as between cable services and cable operators. Dozens of cable networks negotiate agreements with cable operators (including rural cable operators) for the right to distribute that network's programming to subscribers. Retransmission consent is simply another name for the same negotiation process as employed by broadcasters.

There is one important difference in the negotiations between local television stations and cable operators from those between cable networks and cable operators. Most notably, as a rule, cable operators have refused to pay licensee fees in exchange for the right to distribute the programming of local television stations (notwithstanding that these stations allegedly offer "must have" programming). [4] In this proceeding, some parties have explained that cable operators initially did not want to pay for carriage when retransmission consent became the law of the land because of rate regulation.[5] Now, however, it is not at all clear what their justification is, as nearly a decade has passed since such rate regulation was eliminated.

The free market does not mean anyone should expect to get others' property for free; absent the real likelihood of anticompetitive conduct, the free market expects that private parties negotiate the terms (including compensation) for which a buyer is willing to pay to a seller for its product and services without government interference. [6] Moreover, stations, like other retailers, have the right to market their product

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4 *See* Anne Veigle, *Cox Puts 4 Cable Systems on Block to Reduce Debt,"* Communications Daily at 3-4 (Mar. 9, 2005) (retransmission consent negotiations between Nexstar Broadcasting, which owns local stations in Abilene, TX and San Angelo, TX, and Cox Communications, the market's dominant cable operator, have reached an impasse over the request by broadcaster that the cable operator pay 30 cents per subscriber – a fee less than that commanded by many cable networks – for the station's network and local news, sports and entertainment programming); John M. Higgins and Bill McConnell, *No Cash, No Carry: Digital Broadcasting Reignites the Fight Over Whether Cable Operators Should Pay to Carry TV Stations,"* Broadcasting and Cable at 20 (Feb. 7, 2005) (Nexstar/Cox "scuffle is playing out across the country between local broadcasters, which want cash from cable systems carrying their signals, and cable operators, which don't want to pay.")

5 Joint Cable Comments at 7.

6 *See* Report on the Packaging and Sale of Video Programming Services to the Public at 80 (submitted by Federal Communications Commission to House Committee on Energy and Commerce on Nov. 18, 2004) ("A La

differently to different classes of consumers. Stations, unlike cable operators, choose, as a public service, to deliver their programming over the stations' wireless systems directly to consumers for free. That public service does not include donating content to their cable operator competitors, who then profit from that same programming by re-selling it to consumers for a monthly fee *and* by attracting advertisers away who would otherwise buy advertising time on those local stations. In this respect, local stations are no different from the bulk goods manufacturer that labels its products with the warning: "Not for individual resale."

Faced with the overwhelming free-market justifications for retransmission consent, critics seek to entice regulators to interfere with the free market by claiming that specific programming is "must have" because it is currently popular. First, the temporary popularity of specific programming among a limited segment of consumers does not constitute market power any more than the fact that an individual subset of consumers may prefer a favorite restaurant, especially as viewers of the station can change their minds by a simple point and click of the remote. [7] Second, such allegedly "must have" programming has not precluded the recent loss of viewers from free to pay television options: amid the hundreds of new channel options offered by local stations' cable operator competitors, all free, over-the-air television stations now collectively receive less than half of the nation's viewership.

The conditions imposed on the recent merger of Fox and DirecTV do not indicate otherwise. In that instance, Fox, a broadcaster and cable network owner with substantial valuable content, was seeking Commission approval to acquire a multichannel video programming distributor that, at least in some

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Carte Report") (stating that traditional antitrust claims are sufficient to maintain competitiveness of programming redistribution market); Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified at 47 U.S.C. § 325(b)) (conditioning right of cable system to retransmit local programming on retransmission consent or a mandatory carriage election).

7 The ephemeral nature of such alleged "market power" is evident even within these critics' comments: one commenter classifies as "must have" several network entertainment programs that had been terminated by their network before this proceeding even commenced. *See* Joint Cable Comments at 13.

circumstances, competes with cable operators. [8] The argument for the conditions (to which Fox voluntarily agreed) was that the acquisition of a substantial ownership stake in DirecTV afforded Fox the means, motive and opportunity to profit directly by denying other multichannel video programming distributors access to Fox's admittedly valuable content. [9]

Even assuming that that assertion was accurate, the circumstances of that case are obviously the exception, not the rule. The overwhelming majority of television stations premise their business plans on attracting the largest audience (either overall or in targeted demographics) possible. It does not uniquely and materially benefit the typical television station to attract its audience over the television station's own wireless distribution system as opposed to cable or other multichannel systems: because the station does not demand that a consumer pay to receive the station's over-the-air signal, the station does not benefit from directing consumers to rely on an over-the-air signal, especially when other local station competitors remain available on cable systems.

The Commission has recognized as much. In its A La Carte report to Congress, which postdates the *Fox-DirecTV* decision, the Commission underscored that no special measures are needed to protect cable operators from local television stations.[10] The Commission instead deemed antitrust law to be more than sufficient protection against any local television station exercising market power or engaging in material anticompetitive conduct. [11]

The available evidence also does not support the claim that retransmission consent has led to excessively high cable rates. Fundamentally speaking, that cable operators are forced to compensate others for using their property – whether that property is electricity or labor or a digital server – will increase

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8 *General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, For Authority to Transfer Control*, Memorandum Opinion and Order, FCC 03-330, at ¶ 3 (2004).

9 *See id.* at 476-77 (¶ 4).

10 A La Carte Report at 80.

11 *Id.*

the costs of the cable operator. But the fact that a cable operator has to pay fair value for the inputs on which it bases its "product" hardly offers a sufficient basis for government intervention, whether the costs result from the operator's need for power or workers or equipment or program content.

Second, there is no evidence that cable operators are "paying" television stations anything in excess of the fair market value of the stations' content. [12] As noted, cable operators across the nation continue to refuse to pay cash in private retransmission consent dealings. Indeed, recent events demonstrate that some cable operators refuse to pay even 30 cents per subscriber to carry a local NBC affiliate's or other network affiliate's programming. [13] Accordingly, cable operators get many stations' content at no cost (except for minor concessions like better channel placement). Further, to the extent cable operators agree to carry a station group's commonly owned cable networks in exchange for the stations' retransmission consent, recent government reports have confirmed that these networks receive license fees entirely consistent with that of similar networks that are unaffiliated with a broadcaster. As many cable operators have paid nothing for local stations, and paid going rates for other affiliated cable networks, it is impossible to conclude that higher cable rates are driven by retransmission consent.

No Other Alleged Concern Justifies Government Disruption of the Established and Smoothly Functioning Programming Market

As for the other generalized complaints regarding retransmission consent, none justify government interference in the negotiations of private parties. By way of example, three significant arguments against retransmission consent actually demonstrate the public utility of the policy.

First, some critics complain that retransmission consent has resulted in more high quality cable networks. For example, the Joint Cable Commenters complain that news channels like MSNBC and Fox News were only able to be launched thanks to cable operators' negotiations to resell the broadcast

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12 *See* U.S. General Accounting Office, *Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, GAO-04-8 (October 2003).

13 *See* Veigle, *supra* note 4.

programming of NBC's and Fox's owned television stations. Undeniably, the presence of such 24-hour national news channels has benefited the public. Moreover, many cable operators agree that these programming services have benefited cable operators. Earlier this year, the trade publication *Multichannel News* released the results of a survey of cable systems asking them to identify their favorite network groups. Among the top 10 were the following network organizations: NBC Universal Cable, ESPN (owned by Disney), MTV Networks (owned by Viacom/CBS) and Fox News Channel. [14] As these retransmission-fueled networks have benefited the public and cable operators alike, these examples illustrate the benefits, not drawbacks, of the retransmission consent policy.

Second, retransmission consent has not resulted in the alleged domination of the cable network universe by broadcasters. Retransmission consent played, at most, a limited role in the current number of cable networks owned by broadcasters. For example, the Joint Cable Commenters have pointed to one cable network – MSNBC – that NBCU has developed through retransmission consent. [15] Of NBCU's four other leading cable networks – CNBC, Bravo, Universal and the SciFi Channel – NBCU acquired three only after each was already available in 60 million or more homes. The Commenters do not explain how retransmission consent was essential to the success of these networks when these cable networks achieved most or all of their current distribution prior to NBCU's ownership.

These comments also ignore the many other reasons why cable networks that are commonly owned by a broadcast network often succeed; put simply, broadcast networks are outstanding programmers. The Bravo cable network had substantial distribution before NBCU acquired it – but the hits that aired after NBCU acquired the network – including "Queer Eye for the Straight Guy" – were what made Bravo a cultural phenomenon.

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14 Broadcasting & Cable/Multichannel News, Local Cable Ad Sales Electronic Newsletter at 2 (dated March 22, 2005) (reporting that Beta Research has polled executives at individual cable affiliates to determine which cable networks – or families of cable networks – provide the most satisfactory product).

15 Joint Cable Comments at 9, 10.

Third, critics complain that broadcasters have not used retransmission consent to develop "more and better broadcast offerings."[16] It is not clear what this means (especially given the converse complaint of some that stations offer "must have" programming). As to "more" offerings, until more television households have access to digital multicast programming, a local station only has the technical ability to offer a single program at a time. As for "better" offerings, it should be recalled that, in a universe of hundreds of television channels, broadcasters still capture about half the nation's viewers. Accordingly, stations have done what they could to continue to improve the product they deliver consumers.

Moreover, when local stations do offer "more and better" broadcast offerings, cable has not always been receptive. NBC WeatherPlus is both a "more and better" broadcast offering, which offers unique round-the-clock coverage of local and, secondarily, national weather. But the Joint Cable Comments nonetheless complain that NBCU may use retransmission consent negotiations to push for carriage of NBC WeatherPlus, while simultaneously alleging that the intended purpose of retransmission consent was to facilitate cable carriage of such "more and better" programming.[17]

Fourth, the differences between retransmission consent vis-à-vis cable and DBS have not been demonstrated to justify any such significant change in the policy, never mind the sweeping elimination or reduction of retransmission consent. As retransmission consent is just jargon for the free market, a similar free-market policy should apply to both services.

Conclusion

In passing the 1992 Cable Act, Congress clearly explained that in a media environment where cable systems actively "compete with local broadcasters for programming, audience, and advertising" is inappropriate and anticompetitive to permit cable systems to take local broadcaster content and not compensate the broadcaster.

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16 *Id.* at 28.

17 *Id.* at 12.

Furthermore, the issues presented in this proceeding reflect the fundamental difference between cable operators and local television stations: today's consolidated cable operators operate in a national market generally without regard for the location of the network; by contrast, local stations routinely focus on their local communities. Accordingly, cable operators see a remote network affiliate as roughly equivalent for that network's local affiliate. Or they view NBC Network and its affiliates as a single coherent entity, when the truth is the NBC affiliates include scores of different (and often competing) ownership groups.

The Commission, on the other hand, has recognized the difference between local stations and national networks since the very advent of broadcast networks. That difference between local and national is reflected in many Commission's policies, ranging from the exclusivity policies to the local ownership rules. The attack against retransmission consent and the Commission's exclusivity policies neither serves consumers nor stations that value such a local commitment. Accordingly, the Commission should maintain each of these policies.

Respectfully submitted,

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